

EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CELGENE CORPORATION,	.
	.
Plaintiff,	.
	.
vs.	.
	.
	.
HETERO LABS LIMITED, et al.,	.
	.
Defendants.	.
	.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MICHAEL A. HAMMER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: WILLIAM C. BATON, ESQ.
Saul Ewing Arnstein & Lehr LLP
One Riverfront Plaza
1037 Raymond Blvd.
Suite 1520
Newark, NJ 07102
(973) 286-6700
wbaton@saoul.com

FRANK CHARLES CALVOSA, ESQ.
Quinn Emanuel Urquhart & Sullivan LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7569
frankcalvosa@quinnemanuel.com

Audio Operator:

Transcription Service: KING TRANSCRIPTION SERVICES
3 South Corporate Drive, Suite 203
Riverdale, NJ 07457
(973) 237-6080

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1 (APPEARANCES continued)

2 For the Plaintiff: F. DOMINIC CERRITO, ESQ.
3 Quinn Emanuel Urquhart & Sullivan LLP
4 51 Madison Avenue
5 22nd Floor
6 New York, NY 10010
7 (212) 849-7000
8 Nickcerrito@quinnemanuel.com

6 MATTHEW J. HERTKO, ESQ.
7 Jones Day
8 77 West Wacker
9 Chicago, Illinois 60601-1692
10 (312) 269-1581
11 Mhertko@jonesday.com

9 For the Defendants MELISSA E. FLAX, ESQ.
10 Hetero Labs Carella Byrne Cecchi Olstein Brody &
11 Limited, Hetero Agnello, PC
12 Labs Limited 5 Becker Farm Road
13 Unit-V, Hetero Roseland, NJ 07068
14 Drugs Limited, (973) 994-1700
15 Hetero USA, Inc.: mflax@carellabyrne.com

13 ANDREW M. ALUL, ESQ.
14 Taft Stettinius & Hollister LLP
15 111 East Wacker
16 Suite 2800
17 Chicago, IL 60601
18 (312) 836-4135
19 Aalul@taftlaw.com

17 For the Defendant ROBERT JOSEPH FETTWEIS, ESQ.
18 Breckenridge Fleming Ruvoldt PLLC
19 Pharmaceutical, 250 Moonachie Road
20 Inc.: Suite 501
21 Moonachie, NJ 07074
22 (201) 518-7878
23 rfettweis@flemingruvoldt.com

21 C. KYLE MUSGROVE, ESQ.
22 Haynes and Boone
23 800 17th Street NW
24 Suite 500
25 Washington, D.C. 20006
(202) 654-4502
Kyle.musgrove@haynesboone.com

1 (APPEARANCES continued)

2 For the Defendant ARNOLD B. CALMANN, ESQ.
3 Mylan Saiber LLC
4 Pharmaceuticals, One Gateway Center
5 Inc.: 10th Floor
Newark, NJ 07102-5311
(973) 622-3333
Abc@saiber.com

6 ELHAM FIROUZI STEINER, ESQ.
7 Wilson Sonsini Goodrich & Rosati
12235 El Camino Real
8 San Diego, CA 92130
(858) 350-2246

9 For the Defendant ELEONORE OFOSU-ANTWI, ESQ.
10 Teva: Walsh Pizzi O'Reilly Falanga LLP
One Riverfront Plaza
1037 Raymond Blvd
11 Suite 600
Newark, NJ 07102
12 (973) 757-1022
Eofosuantwi@walsh.law

13 CHRISTOPHER T. JAGOE, ESQ.
14 Kirkland & Ellis LLP
601 Lexington Avenue
15 New York, NY 10022
(212) 446-4945
16 Christopher.jagoe@kirkland.com

17 For the Defendants GURPREET SINGH WALIA, ESQ.
18 Aurobindo Pharma FisherBroyles, LLP
100 Duffy Ave.
19 Limited, Aurolife Suite 510
Pharma LLC, Eugia Hicksville, NY 11801
Pharma Specialties (929) 429-5721
20 Limited: gurpreet.walia@fisherbroyles.com

21 JOSEPH SCHRAMM, III
22 FisherBroyles LLP
100 Overlook Center
2nd Floor
23 Princeton, NJ 08540
(856) 733-0220
24 Joseph.Schramm@fisherbroyles.com

25

1 (Commencement of proceedings at 10:09 A.M.)

2

3 THE COURT: All right. So we are on the record in
4 matter of Celgene Corporation versus Hetero Labs Limited and
5 Celgene Corporation versus Par Pharmaceutical. The Hetero
6 Labs Limited matter is Civil No. 17-3387. The Par
7 Pharmaceutical matter is 17-3159.

8 And let me take appearances of counsel, please,
9 beginning with Celgene.

10 MR. BATON: Good morning, Your Honor, Bill Baton of
11 Saul Ewing Arnstein & Lehr, New Jersey counsel for Celgene.

12 MR. CERRITO: Good morning, Your Honor. Nick
13 Cerrito and Frank Calvosa, Quinn Emanuel Urquhart & Sullivan,
14 on behalf of Celgene.

15 MR. HERTKO: Good morning, Your Honor, Matt Hertko
16 from Jones Day also on behalf of Celgene.

17 THE COURT: All right. Did we miss somebody? No?
18 Okay.

19 Ms. Flax, how are you?

20 MR. FLAX: Good morning, Your Honor, Melissa Flax
21 from Carella Byrne on behalf of Apotex and Hetero. And I'll
22 let my cocounsel introduce themselves.

23 MR. ALUL: Good morning, Your Honor, Andrew Alul
24 from Taft Stettinius & Hollister in Chicago on behalf of the
25 Apotex and Hetero defendants.

1 THE COURT: All right. Good morning.

2 MR. FETTWEIS: Good morning, Your Honor. Robert J.
3 Fettweis, Fleming Ruvoldt, local counsel for Breckenridge
4 Pharmaceuticals. I'm joined by Kyle Musgrove, patent
5 counsel, Haynes and Boone in Washington.

6 THE COURT: All right. Good to see you,
7 Mr. Fettweis.

8 Mr. Calmann.

9 MR. CALMANN: Good morning, Your Honor. Arnold
10 Calmann for Mylan. And with me is my cocounsel Ellie Steiner
11 from Wilson Sonsini in California.

12 THE COURT: Ms. Steiner, how are you?

13 MR. CALMANN: Thank you, Your Honor.

14 MS. OFOSU-ANTWI: Good morning, Your Honor.
15 Eleonore Ofosu-Antwi from the Walsh firm. And with me is my
16 cocounsel Chris Jagoe from Kirkland & Ellis for Teva.

17 THE COURT: Good to see you again, counsel.

18 MR. WALIA: Good morning, Your Honor. This is
19 Gurpreet Walia. And with me is cocounsel Joe Schramm for --
20 from FisherBroyles for Aurobindo --

21 THE COURT: All right. Good morning. All right.
22 So what I'm looking at the most -- I think the most currently
23 substantive correspondence that I have -- and if I'm wrong,
24 please tell me -- is the Docket Entry 164. This is the
25 Celgene Hetero Labs Limited, April 27th letter. If I recall,

1 | you folks had proposed and I had agreed in both matters to
2 | extend the deadline to serve invalidity contentions.

3 | MR. CERRITO: Your Honor, I think they said --

4 | THE COURT: Go ahead.

5 | MR. CERRITO: The April 27th letter dealt with only
6 | one particular --

7 | THE COURT: Right. That was just Hetero. I'm
8 | looking at the March 28th letter and then the April 27th
9 | letter. The March 28th letter was both Par and Hetero. The
10 | April 27th letter, Docket Entry 164, is just Hetero.

11 | MR. CERRITO: Right. And it dealt -- it only
12 | dealt -- it wasn't -- the 164 deals only with a schedule
13 | pertaining to Mylan.

14 | THE COURT: Right.

15 | MR. CERRITO: With regard to certain discovery
16 | dates there.

17 | THE COURT: Right. So why don't we do it this way.
18 | Why don't I start with Celgene and why don't you bring me up
19 | to speed on where we are in both matters where they --
20 | because I don't think I've had a conference in this case
21 | previously. Right? Okay.

22 | So why don't you bring me up to speed on where we
23 | are with both matters, where they are on the same track,
24 | where they diverge, and help me just sort of generally get my
25 | bearings.

1 MR. CERRITO: To answer that, I guess the last
2 question first, they're basically on the same track with the
3 minor exception of the Mylan venue-related discovery. As
4 Your Honor knows that's a sort of running -- a separate
5 isolated issue with Mylan only.

6 Just to get Your Honor up to speed a little bit,
7 the case was filed back in 2017. Initial disclosures in this
8 case were exchanged in October. There are --

9 THE COURT: I'm sorry. You say "this case." We're
10 on -- you're talking about both cases?

11 MR. CERRITO: Yeah, they were done simultaneously.

12 THE COURT: That's fine. Okay. So -- so go ahead.

13 MR. CERRITO: Everything runs together, I guess,
14 Your Honor, essentially.

15 THE COURT: Okay.

16 MR. CERRITO: There's currently six defendants.
17 There are seven filed, but one defendant decided to go a
18 different route. But there are six active defendants. The
19 number of patents asserted here are between four and nine
20 depending on who certified as to what. So two parties have
21 four. The remainder of the other four parties have nine
22 patents.

23 The responsive contentions were exchanged back in
24 April 20th -- not an insubstantial endeavor on behalf of,
25 certainly, Celgene. Nearly a thousand pages were submitted

1 there.

2 As a result, now that, you know, the issues have
3 been framed with contentions, we are now undertaking some
4 discovery. There has been some letters back and forth
5 between parties concerning certain of the discovery. We
6 think that there is one issue that is ripe for a decision at
7 this point. Of course, we'd have to file a motion or ask
8 Your Honor for leave to file a motion. We're deciding how to
9 approach that, so we may be --

10 THE COURT: Okay.

11 MR. CERRITO: -- approaching Your Honor in the near
12 future. It's a sort of isolated issue.

13 THE COURT: With respect to both cases or just one
14 or the other?

15 MR. CERRITO: I -- it'd be both.

16 THE COURT: Okay.

17 MR. CERRITO: Yes, Your Honor. I apologize. I
18 will -- unless I guess I say --

19 THE COURT: Unless to the contrary.

20 MR. CERRITO: I just don't think of them as
21 separate cases, so I apologize.

22 THE COURT: That's fine. And I still don't know
23 what I think of them, so.... So let's try and figure all
24 that out.

25 MR. CERRITO: Fair enough. Fair enough. So

1 we're -- again some letters have been exchanged, but it
2 doesn't really be ripe on those issues.

3 We did receive some correspondence late last night
4 concerning defendants' desire to set some dates into the
5 schedule. We received that last night about 9 o'clock. We
6 have not, obviously, had a chance to discuss that with our
7 client.

8 We're happy to discuss that with defendants and get
9 back to Your Honor with a recommendation or hopefully an
10 agreement.

11 THE COURT: Yeah, you actually presage my next
12 question, which is I know that there were -- well, actually I
13 don't know. Whether we're operating under a viable pretrial
14 scheduling order at this point.

15 MR. CERRITO: Your Honor, I guess I don't presume
16 to understand what you mean by one --

17 THE COURT: In other words. Go ahead.

18 MR. ALUL: I was just going to say, Your Honor, I
19 don't believe we are. We're operating on a truncated
20 schedule at best that basically leaves a number of dates open
21 after -- after the claim construction schedule. And we're
22 almost a year into this case -- I believe we're 10 months
23 into this case. We're eight months into fact discovery. I
24 generally agree with what Mr. Cerrito's synopsis of what's
25 happened in this case, except that I believe we've engaged in

1 some very considerable fact discovery. We served our Rule 34
2 requests, Rule 33 interrogatories. We've gotten responses
3 back from them. We're working through some deficiencies with
4 them. We've served our invalidity contentions, our
5 noninfringement contentions. Hundreds of pages. They served
6 their response and their infringement contentions.

7 THE COURT: Right.

8 MR. ALUL: Both sides have exchanged hundreds, if
9 not thousands, of pages of prior art and other documentary
10 evidence in connection with those contentions. Really, the
11 only thing we have left to do is take fact depositions. And I
12 believe Celgene has yet to serve Rule 34 requests for
13 documents. They've already served Rule 34 requests for
14 samples. We've produced those.

15 So we've had significant fact discovery underway
16 here. And at least on the defense side, we believe we need a
17 schedule.

18 MR. CERRITO: Well, Your Honor, I -- had most of
19 it, right up until part where he said --

20 THE COURT: No, I didn't hear a lot of
21 disagreement. But, right.

22 MR. CERRITO: Well -- said we're basically done. I
23 mean, we basic just started is where we are.

24 Once contentions are served to the parties --

25 THE COURT: This is going to get interesting.

1 Okay.

2 MR. CERRITO: I mean, that's when you know what
3 your case is. Right? They served their contentions. We
4 responded. They did hundreds. We did thousands in response.

5 And now we know where -- that happened April 20th,
6 so couple of weeks ago, basically, we framed the case.

7 Look, we have no problem talking about a schedule.
8 We'll do that offline and present to Your Honor.

9 THE COURT: Yeah.

10 MR. CERRITO: Unfortunately, we were sort of
11 sandbagged by their attempt to rush into court with a
12 schedule that never raising it --

13 THE COURT: I'm sure no sandbagging was intended.

14 But, look, why don't we do it this way, right, and
15 approach it practically. How about if I give you folks two
16 weeks -- and if this isn't enough time because we have -- we
17 have multiple parties, tell me. I'll be happy to work with
18 you -- to meet and confer and try to get me a schedule. And
19 actually, shame on me, I probably should have done that in
20 the run-up to this conference. But no harm, no foul.

21 So if two weeks is enough time.

22 And then if you folks, as you most certainly will,
23 disagree on this part or that part of the schedule, you'll
24 tell me in that submission what your respective disagreement
25 is, and each of you can please concisely tell me the basis

1 for your position as to that aspect of the schedule on which
2 you disagree.

3 MR. CERRITO: Yes, Your Honor.

4 MR. ALUL: Happy to do that, Your Honor.

5 I'd just like to push back on this assertion
6 somehow we sandbagged them. We asked them on Monday actually
7 for -- then I'll leave it alone.

8 THE COURT: You're arguing when you're ahead.

9 MR. ALUL: I'm sorry?

10 THE COURT: You're arguing while you're ahead. No,
11 I didn't infer sandbagging.

12 MR. ALUL: Thank you. But we have a proposed
13 schedule here with us, but we're happy to meet and confer
14 with them. Yeah.

15 THE COURT: Yes, please do that. Look, if nothing
16 else, I don't expect you folks -- just experience teaches me
17 that you won't agree on the entirety of the schedule,
18 especially if there's at least some disagreement over what's
19 been accomplished, but at least in doing this -- look, here's
20 the truth about being a magistrate judge in complex civil
21 litigation. Okay? Unless you're Stanley Chesler, who's
22 obviously no longer a magistrate judge and hasn't been in a
23 while. But half the time, you're just trying to figure out
24 where the disagreement lies. Okay? And you're doing it in,
25 you know, with 10 other conferences going on that day, a

1 settlement conference that may or may not actually settle.
2 You don't know because you're only in hour 3, and you still
3 don't know exactly where the parties are.

4 So the best thing can you do by meeting and
5 conferring, if you -- look, in a perfect world, you'll agree
6 on everything. But in a less than perfect world, at least
7 you'll tell me where you disagree and why, and that'll let me
8 get through it a lot more quickly and get you folks back an
9 order that reconciles the issues.

10 MR. ALUL: Thank Your Honor.

11 THE COURT: All right. What else you got?

12 MR. CERRITO: Nothing, Your Honor.

13 THE COURT: Okay.

14 DEFENSE ATTORNEY: Your Honor, the only question I
15 have is I know that this is unusual in New Jersey, but given
16 the 30-month stay date, would it be possible to talk to Judge
17 Salas about getting a trial date. That we had originally
18 proposed that back in front of Judge -- the other magistrate
19 judge in January.

20 THE COURT: And I'm going to guess, did he say in a
21 sort of skeptical tone, you can ask?

22 DEFENSE ATTORNEY: I think we actually -- my record
23 of -- is that he said he would talk to her. In fact,
24 Your Honor, if you look -- my recollection at that time was
25 that he said he would check with Judge Salas, but, obviously,

1 if we had a trial date, then it's much easier to work
2 backwards. If that's certainly not something that's done
3 here, we're fine with that. But --

4 THE COURT: I can -- maybe I'm betraying just sheer
5 ignorance. I've not heard of that practice before.

6 Mr. Cerrito, do you want to --

7 MR. CERRITO: I've never heard of that either,
8 Your Honor. And just so we're on --

9 THE COURT: I'm not saying it doesn't happen. I'm
10 just saying I haven't heard of that previously.

11 MR. CERRITO: I've had, as Your Honor knows, many
12 cases before Judge Salas. I've never heard that.

13 But the 30-month stay in this case is more than two
14 years away. This was actually a 42-month stay because of the
15 "date certain" filing. So it's August 2020. I don't know
16 that we can talk about trial dates two and a half years from
17 now.

18 MR. ALUL: Just to clarify, Your Honor, in the
19 Rule 16 transcript, Judge Dickson did say that he would check
20 with Judge Salas.

21 THE COURT: I'm not doubting.

22 MR. ALUL: Yeah.

23 THE COURT: Yeah, I don't doubt that.

24 MR. ALUL: But we're certainly willing to follow
25 whatever the Court's predilection is on this.

1 THE COURT: Here's what I propose you do. Hold on.
2 Let me see if I can find it in the transcript. I was going
3 to suggest first submitting a letter, but if it's already in
4 the transcript, I'm not sure that that's entirely necessary.

5 MR. ALUL: Yes, it's -- Your Honor. We have some
6 citations. It's actually in the scheduling order that's in
7 place. It's Footnote 2 in the calendar attached to the
8 schedule. And you'll see hearing transcript, October 25th,
9 2017, at 14:24 to 16:5, and then 49 --

10 THE COURT: I'm sorry. Wait. Hold on. Let me
11 just catch up with you.

12 MR. ALUL: Sure.

13 THE COURT: October -- tell me that again. What's
14 the date?

15 MR. ALUL: Sure. It's October 25th, 2017, is the
16 transcript of the Rule 16.

17 THE COURT OFFICER: What page?

18 MR. ALUL: Page 14 to 16, and page 49, lines 4
19 through 19. I actually have it on my phone. I don't have a
20 hard copy of it here with me.

21 THE COURT: It's all right. I've got it here -- or
22 I will.

23 MR. CERRITO: What may be missing from that written
24 word is the skepticism Judge Dickson showed when that
25 statement was made.

1 But regardless, Your Honor, we're talking about a
2 case --

3 THE COURT: I'll raise the issue. I mean --

4 MR. CERRITO: I would encourage you to talk to
5 Judge Dickson.

6 THE COURT: J, did you make a note of those page --
7 what are the pages again? I'm sorry.

8 MR. ALUL: Sure. They 14 to 16 and 49.

9 THE COURT: Okay. All right.

10 MR. CERRITO: I think it's, quite frankly, a little
11 unproductive to do this piecemeal and present to Your Honor a
12 full picture.

13 THE COURT: Here's the other problem -- right? --
14 realistically with predicting a trial schedule or a trial
15 date two years out. As you folks know, and certainly Judge
16 Salas is eminently sensitive to the 30-month stay issue. But
17 we also operate -- or she operates as a district judge in a
18 world where criminal cases get priority constitutionally, and
19 trying to predict exactly an open date, you know, in a case
20 for trial purposes is at this point extraordinarily difficult
21 and speculative.

22 But I'll take a look at the transcript, and I'll
23 talk about it.

24 MR. CERRITO: I guess I would just add, if we're
25 going to go down this road, you know, obviously, this Court's

1 well aware of Local Rule 2.4 about Markman scheduling and
2 what expert reports follow therefrom. We obviously agree
3 with the rule. We think that you should have Markman ruling
4 before you end up doing expert reports, and maybe more so in
5 this case than in others, since there are so many defendants.

6 THE COURT: Right.

7 MR. CERRITO: There's going to be -- and I'm
8 guessing, between all the parties -- remember, I have to show
9 infringement against all of them. I mean, the different
10 experts against all of them. There could easily be 15 to 20
11 experts in this case. To rush with the schedule, to work
12 backwards to set a date when we don't have a Markman may
13 require us to do two sets of expert reports, may require
14 amended contentions, may require all the things that Rule 2.4
15 was set up to avoid.

16 THE COURT: Right. I'll say this outset, I'd have
17 some real concerns about locking in a schedule now, just
18 getting sort of up to speed on the case.

19 MR. ALUL: Understood, Your Honor. I -- again, we
20 just --

21 THE COURT: I understand the idea and the purpose
22 behind it.

23 MR. ALUL: We didn't -- the issue for us is,
24 Your Honor, we're in this case. We've been in this case now
25 for almost a year or eight months in the fact discovery.

1 THE COURT: Right.

2 MR. ALUL: We've hired experts who -- some of whom
3 are physicians, some of whom are university professors who
4 have very busy schedules who are calling me every month
5 saying, when are our services going to be needed?

6 We have corporate clients who for budgetary reasons
7 need to know when big litigation expenditures are going to
8 take place in this case.

9 THE COURT: Yeah, well, I have to be honest, on
10 that one, your corporate clients are use -- especially in
11 these sort of cases, this is probably something that they've
12 grown accustomed or adapted to by now.

13 MR. ALUL: Understood. Okay. Fair enough,
14 Your Honor.

15 I guess my point is, though, we've been in this
16 case for a year and a half now. We've hired experts --
17 for -- I'm sorry -- for a year now. We're eight months into
18 fact discovery. We know --

19 THE COURT: He was about to get up and object to
20 year and a half.

21 (Simultaneous conversation)

22 THE COURT: And you even see him out of the corner
23 of your eyes, so I would think --

24 (Simultaneous conversation)

25 MR. CERRITO: See, I don't even have to say

1 anything. I just have to look like I'm going to stand up.

2 MR. ALUL: So, you know, again, I find it -- I've
3 practiced before this Court for years now, and I find it
4 unusual that we're almost a year into this case, and we don't
5 have a complete schedule; set aside the trial date issue.
6 And I think we, on the defense side, would find it very
7 helpful if we could lock in some days.

8 THE COURT: Well, look, at a minimum, here's what I
9 can promise you. By the end of -- you folks are going to get
10 me the joint letter by when? We said in two weeks. Right?

11 MR. ALUL: Sure.

12 THE COURT: So that's the 25th. By the end of the
13 month, we're going to have a schedule.

14 MR. ALUL: Great. Thank you, Your Honor.

15 THE COURT: It may not have a trial date on it.

16 MR. ALUL: Sure.

17 THE COURT: But we're going to have a schedule.

18 MR. ALUL: Understood.

19 THE COURT: What else? Nothing?

20 MR. ALUL: Your Honor, there was one last issue
21 that we were going to bring up for Apotex and Hetero, and
22 we'd be happy to submit a formal letter application on this
23 particular issue, if Your Honor would like.

24 THE COURT: Okay.

25 MR. ALUL: There are, as Mr. Cerrito mentioned,

1 nine patents in this case for, I guess, four of the
2 defendant, including both of my clients. One of the patents
3 is a formulation patent. It's a very specific formulation
4 patent. It claims specific capsules of pomalidomide with
5 certain ingredients and certain amounts, weighing certain
6 amounts and having certain sizes. It's a very, very narrow
7 patent. And my clients have designed around it. And we
8 don't infringe. In fact, a few weeks ago, we got Celgene's
9 infringement contentions, which we're still digesting, but
10 they actually concede no literal infringement. They only
11 assert infringement under the doctrine of equivalents. And
12 there, Your Honor, the case law's pretty crystal-clear,
13 Celgene's estopped from asserting infringement of the
14 doctrine of equivalents for two independent reasons: because
15 of how they narrowed their claims during claim construction
16 to avoid the prior art, and because of what they told the
17 Patent Office about their claims to distinguish them from the
18 prior art. And under Federal Circuit case law, Your Honor,
19 prosecution history estoppel is a legal issue for the Court
20 to decide via pretrial summary judgment motion. So --

21 THE COURT: Okay. So -- I'm sorry -- wait. So
22 tell me what the request is.

23 MR. ALUL: So the request is -- the request is for
24 leave to file for summary judgment on this one patent. And
25 we'd be happy to present it as a letter application to

1 Your Honor.

2 THE COURT: Yeah, you're probably going to need to,
3 because that's going to be much more Judge Salas's call than
4 mine, but go ahead, Mr. Cerrito.

5 MR. ALUL: Sure.

6 MR. CERRITO: I mean, besides disagreeing with
7 everything he just said, and there is a legal issue --

8 THE COURT: I imagine on the law, you did. But --

9 MR. CERRITO: Yeah, and I do -- and also it's an
10 issue underlying --

11 THE COURT: Do you concede that there's no literal
12 infringement, though?

13 MR. CERRITO: I believe that is what we said in
14 our -- in the papers.

15 THE COURT: Okay. Okay.

16 MR. CERRITO: But the underlying question of law
17 there, of course, is based on facts. And so, again -- I know
18 he's been here a long time, I've been here a long time, we've
19 all been here a long time, and rarely do we see summary
20 judgment motions for all the reasons that judges typically
21 don't allow them, because they waste time. On the one hand,
22 they want to move forward quickly and do all this stuff, but
23 on the other hand, they want to distract us.

24 THE COURT: Well, they're not proposing to stay
25 discovery. I mean, you're not proposing to stay discovery.

1 MR. ALUL: Oh, no.

2 THE COURT: Right. That's not happening.

3 MR. CERRITO: But when it's six against -- when
4 it's six against one -- easy for them to do that, because
5 they can all do the work. I have to do the work against all
6 of them. They can choose which one of them does the work.

7 So, you know, they can make their application, I
8 guess, Your Honor, but obviously, we would -- we're going to
9 oppose.

10 THE COURT: Well, I assume you're going to want to
11 be heard on that? So you folks will send me a joint letter?
12 Unless you don't want to be heard.

13 MR. ALUL: Sure.

14 MR. CERRITO: I mean, I want to be heard to oppose,
15 yes.

16 THE COURT: Yeah, to oppose him, leave to make the
17 motion. I assume that you're -- obviously you want to -- you
18 want to be heard on opposing any motion, if it's allowed.

19 MR. CERRITO: Whatever -- yes, Your Honor.

20 THE COURT: All right. So what I'll do --

21 MR. CERRITO: Well, if a motion will be allowed.

22 MR. BATON: Yeah, Your Honor, it's Bill Baton.
23 Just to be clear, I think what you're asking is he -- they
24 want to put in a letter --

25 THE COURT: Yeah.

1 MR. BATON: -- requesting leave to file a motion.

2 THE COURT: And I want to know -- your side why
3 that's a bad idea.

4 MR. BATON: Yes. Right.

5 MR. CERRITO: Yes, Your Honor.

6 MR. BATON: But he's just not going to file a
7 motion.

8 THE COURT: No.

9 MR. BATON: Right. Correct.

10 THE COURT: All right. So why don't you folks get
11 that to me also by the 25th.

12 MR. ALUL: Thank Your Honor.

13 THE COURT: Okay. Okay. Anything else? All
14 right. We're adjourned.

15 (Conclusion of proceedings at 10:29 A.M.)
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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 24 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

17th of May, 2018

Signature of Approved Transcriber

Date

Sara L. Kern, CET**D-338
King Transcription Services
3 South Corporate Drive, Suite 203
Riverdale, NJ 07457
(973) 237-6080